IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 420

CHARLES McDANIEL, et al.,

Petitioners,

VS:

JOSEPH BARRESI, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 420

CHARLES McDANIEL, et al.,

Petitioners,

VS:

JOSEPH BARRESI, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

(1) Whether the Constitution requires that objecting Negro and white children be assigned to public schools solely on the basis of race in order to achieve a pre-determined racial balance?

(2) Whether the assignment of children to public schools solely on the basis of race to achieve a pre-determined racial balance, where such assignment was made pursuant to compulsion of the Department of Health, Education and Welfare in pending enforcement proceedings under Title 6 of the Civil Rights Act of 1964, is contrary to Sections 401 and 407a of said Act, 42 USCA §§ 2000c, 2000c-6, the Elementary and Secondary Education Act of 1965 as amended, 20 USCA 242, and Sections 409 and 410 of the 1968 Appropriations Act for the Department of Health, Education and Welfare, PL 90-557, Title IV, § 18?

(3) Whether a plan of desegregation which requires selected Negro children to be assigned and bussed out of their attendance zones to schools located outside their neighborhoods, while white children are permitted to attend schools within their attendance zones, denies to such Negro children the equal protection and due process of law guaranteed by the Fourteenth Amendment?

(4) Whether the neighborhood plan of desegregation adopted by petitioners on April 29, 1969, and later rejected by the United States Department of Health, Education and Welfare, was a constitutional plan of desegregation?

STATEMENT

The Statement in the brief of Petitioners is correct, but requires some supplementation to facilitate understanding.

In essence, these proceedings began with objections[1] filed by parents in three neighborhoods of Clarke County, Georgia, to a new plan of school desegregation adopted by the Clarke County Board of Education on July 30, 1969 (A. 203), in response to demands by the United States Department of Health, Education and Welfare in pending enforcement proceedings under Title 6 of the Civil Rights Act of 1964 (A. 97, 223).

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1. Under Georgia law, as a condition precedent to judicial review of any action of a local board of education, administrative remedies must first be pursued by filing a "Motion for Reconsideration" with the local board, following which a quasi-judicial type hearing is held before the local board, followed by an appeal to the State Board of Education. See Ga. Code §32-910, and Rules and Regulations of the State of Georgia, Vol. 4, §160-1-.18.

The objections relate only to the elementary schools, and no question is presented here as to the junior high and high schools.[2]

The respondents originally consisted of parents residing in three communities in Clarke County: (1) University Heights, an all-white community in the southeastern part of the county (A. 138, 207); (2) Rock Springs Homes, located in the south central part of the county (A. 17, 26), wherein reside three Negro plaintiffs, Mrs. Otis Sims (A. 136), Mrs. Eddie Cross and Miss Emma Young (A. 154); and (3) Northwest Clarke, consisting of four smaller communities known as Camelot, Oconee Heights, Tallassee Road and Westgate Park (A. 3, 63), and which is occuppied by one Negro respondent, Mrs. Magnolia Faust (A. 68) and a number of white respondents. The University Heights and Rock Springs Homes parents were named as plaintiffs in one action (A. 16) and the Northwest Clarke parents in the other (A. 2). Following the decision of Clarke Superior Court, only the Negro plaintiffs in the Rock Springs Homes case, and the Northwest Clarke parents prosecuted appeal to the Supreme Court of Georgia.

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2. During 1969-70, the 3 junior high schools were operated on a feeder plan, and the two high schools in the system were operated on a freedom of choice plan (A. 168). During the current school year, the 3 junior high schools continue to be operated on a feeder plan (A. 169) and the two high schools are paired, with grades 11-12 attending the prior white school (Athens High) and grade 10 attending the former Negro High school (Burney Harris). A proposed new high school has not yet been constructed. The closing of the previously all-Negro high school and its conversion to a school for grade 9 only has been the subject of demonstrations and protests by members of the Negro community earlier this year.

Consequently, the question as to the University Heights parents is not in issue here.

All of the respondents contended below that the assignment of their children to schools solely on the basis of race to achieve a racial balance was both illegal and unconstitutional, and in addition, the three Negro parents residing in Rock Springs Home attack the assignment of their children out of their attendance zone (West Broad) to Barrow on the ground that this constitutes a discrimination as against them in that only Negro children are being assigned out of their zones.

SUMMARY OF ARGUMENT

(I) The assignment of children to public schools solely on the basis of race is not required by the Constitution for any reason.

(a) When Brown I was before the Court, statements of counsel in the briefs as well as in oral argument reflect the clear understanding that the abolition of discrimination was the objective being sought and not an affirmative requirement of integration.

(b) The language of Brown I and II requires the conclusion referred to above, as well as the overwhelming judicial construction placed upon Brown during the first decade thereafter.

(c) Assignment of pupils by race to achieve racial balance or desegregation is not required. Racial classifications are inherently suspect. Proportional racial distribution is not required. White and Negro pupils objecting to such assignments are equally entitled to complain of discrimination. Recent decisions of this Court do not require a contrary result. The language of the Fourteenth Amendment is negative and not positive, and was designed as a shield and not as a sword. Several aspects of the affirmative duty doctrine are not disputed, and are distinguished. For the Court to now hold that the Constitution requires integration rather than prohibiting state - imposed segregation, would necessarily require acceptance of the sociological theory that the education of minority students is retarded by racial imbalance. This doctrine is an impermissible one because (1) It is predicated on a theory of white supremacy (2) It would impinge upon the liberty of white children and parents by compelling them to sacrifice their freedom in order to better the condition of others, and such a choice is beyond the

power of government (3) It would place the Court in an impossible predicament, in holding that racial isolation was unconstitutional, when statistics demonstrate conclusively that in large areas of the country a remedy is impossible of achievement; and it also would require the Court to adjudicate in an area bereft of judicially-manageable standards.

(d) Racial assignments can not be justified as a means of remedying the effects of past discrimination, or under the "disestablishment" precedents. In both of these instances, the rights of third parties were not involved. Here, both Negro and white parents are present whose rights are violated by their children being assigned by race.

(2) Assignment of pupils to overcome racial imbalance is contrary to the Civil Rights Act of 1964. The prohibition of the latter is not limited to states where segregation had not been required by law, for the legislative history discloses that the case principally relied upon involved a state where segregation had been mandated by law as late as 1949, and under a decision of this Court, segregated education is presumed to have continuing effect for over 60 years. Since petitioners'

plan here was adopted under compulsion of HEW in pending enforcement proceedings, such "federal action" is present as to involve a violation of these statutes.

(3) Aside from all other questions, the plan of petitioners here is unconstitutional because it discriminates against the Negro respondents by assigning their children and other Negro children outside their attendance areas while white students are not subjected to such burdens.

(4) In any event, the plan of desegregation adopted by petitioners was properly enjoined for the reason that the plan previously adopted in April was a valid one which HEW was without authority to disapprove.

ARGUMENT

(1) The Assignment of Children to Public Schools Solely On The Basis Of Race Is Not Required For Any Reason.

The facts in this case are not in dispute. The Clarke County Board of Education concedes that the plan of desegregation for its

elementary schools was based on race in order to comply with demands of the United States Department of Health, Education and Welfare in pending Title 6 enforcement proceedings (A. 97, 223). This was accomplished in several ways:

First, relying upon the fact that the system was approximately 33% Negro (A. 37), the Board adopted a policy under which each elementary school would be constituted so as to have not less than 20 nor more than 40% Negro enrollment, except with respect to West Broad and East Athens schools, which were designed to exceed 40% Negro enrollment as a concession to Negro board member Jones (A. 82, 97, 113, 119).

Second, zone lines were deliberately gerrymandered so as to create distorted, non-compact zones which would include both inner-city Negro students and suburban whites (A. 42, 68, 97, 113).

Third, being unable to obtain enough Negro students to achieve the 20-40% Negro enrollment in the outlying schools, the

Board arbitrarily selected five "pockets" of Negro students in four of the geographical zones within the City for assignment to outlying schools outside their respective zones. These pockets were selected without regard to any ascertainable criteria, other than the fact that a particular group would be selected from a given area containing the number of pupils needed at a given outlying school (A. 82, 114). All of the Negro pupils in the five pockets, who resided within walking distances of the schools in their zones, were bussed to schools outside their zones, except those in the West Broad zone, who are required to walk approximately 1 1/2 miles to the Barrow School (A. 43, 48, 115).

It is the position of respondents that the assignment of pupils solely on the basis of race, whether to achieve a pre-determined racial balance or otherwise, is not required by the Constitution, but is itself unconstitutional; that the rights of both white and Negro students so assigned are thereby violated; that such assignments can not be justified either as a means of disestablishing a dual system or as eradicating the effects of past discrimination; and that no decision of this Court has held to the contrary.

(a) The Original Understanding Of Brown

During oral arguments in 1952 which preceded this Court's decision in Brown v. Board of Education, 349 U.S. 294 (1954), Mr. Thurgood Marshall, now a member of this Court, and who was then of counsel for the plaintiffs, stated in a colloquy with Mr. Justice Frankfurter, that the plaintiffs were merely seeking an end to school assignments based upon race, and that a decision in their favor would not confer a right upon any pupil to demand that he be permitted to attend school with pupils of the opposite race. The following transpired:

> "Mr. Marshall: * * * The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on.
>
> "Justice Frankfurter: You mean, if we reverse, it will not entitle every mother to have her child go to a non-segregated school in Clarendon County?
>
> "Mr. Marshall: No, sir.
>
> "Justice Frankfurter: What will it do? Would you mind spelling this out? What would happen?
>
> "Mr. Marshall: Yes, sir. The school board, I assume would find some other method of distributing the children, a recognizable method, by drawing district lines.

* * * * *

"Justice Frankfurter: It would be more important information, in my mind, to have you spell out in concrete what would happen if this Court reverses and the case goes back to the District Court for the entry of a decree.

"Mr. Marshall: I think, sir, that the decree would be entered which would enjoin the school officials from, one, enforcing the statute; two, from segregating on the basis of race or color. Then I think what ever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint.

"For example, the colored child that is over here in this school would not be able to go to that school. But the only thing that would come down would be the decision that whatever rule you set in, if you set in, it shall not be on race, either actually or by any other way. It would violate the injunction, in my opinion.

"Justice Frankfurter: There is a thing that I do not understand. Why would not that inevitably involve -- unless you have Negro ghettoes, or if you find that language offensive, unless you have concentrations of Negroes, so that only Negro children would go there, and there would be no white children mixed with them, or vice versa -- why would it not involve Negro children saying, 'I want to go to this school instead of that school'?

"Mr. Marshall: That is the interesting thing in this procedure. They could move over into the district, if necessary. Even if you get stuck in one district, there is always an out, as long as this statute is gone."

See Transcript of Oral Argument, Brown v. Board of Education, in the Library of this Court, Ward and Paul, Reporters, arguments of December 9, 1952, pp. 21-30.

See also, Alexander M. Bickell, The Supreme Court And The Idea Of Progress, p. 117(1970), and 21 U.S. Law Week 3164 (1952), where the same colloquy appears.

In a brief filed in this Court in 1952 by Mr. Arthur J. Goldberg, later a member of this Court, on behalf of the Congress of Industrial Organizations as Amicus Curiae, it was said:

> "There are objections to segregation which are particularly applicable to the public schools. These general concepts- that permissive separation is not the same as compulsory segregation and that the constitutional evil in all these cases is not the separation of the races but the denial to the individual of his right to choose to be separate or not - may, perhaps, be usefully applied in dealing with the particular kind of segregation problem here presented, viz: public school education---." (Brief, p. 9)
>
> * * * * * * * *
>
> "We do not mean, be it understood, that there is anything in the 14th Amendment which makes it mandatory that pupils be given a choice of school. We only mean that the elimination of compulsory segregation is not the same thing as compulsory attendance of whites at Negro schools, or Negroes at white schools, because the states can, wherever they now compel separation, offer separation on a voluntary basis. Even compulsory attendance at particular schools based on residential districting rests ultimately on the voluntary choice of residence. Negroes and whites would no more be compelled to attend the same schools under such regulations than were Negroes and whites compelled to live in the same neighborhood when compulsory residential segregation was declared invalid in Buchanan v. Warley, 245 U.S. 60." (Id., p. 10)

In a brief filed in Court on May 6, 1955, by Mr. Thurgood Marshall on reargument, the following appears in the "Conclusion":

> "The Negro children before the Court in these cases are entitled to public education on a non-segregated basis. The only way the relief can be meaningful to them is to abolish the policy of using race as a criterion for assignment of students. Thus, the only effective decree would be one which will enjoin the use of race in the assignment of any pupils in the school districts involved." (Brief, pp. 10-11).

In a brief filed by the United States as amicus curiae on reargument on the question of relief, it was said that "The decisive inquiry is whether race or color has been entirely eliminated as a criterion in the admission of pupils to public schools." (p. 26).

Mr. Jack Greenberg, counsel for the organization conducting most of the litigation in school cases, had this to say in 1959 as to the effect of Brown:

> "Moreover, the jury discrimination precedents may be recalled: Bias may be presumed from a consistently segregated result; a token number of Negroes may be legally equivalent to none. If, however, in education there were complete freedom of choice, or geographic zoning, or any other nonracial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection." Greenberg, Race Relations and American Law, pp. 239-40 (1959)

(b) The Holding of Brown And Its Contemporary Construction

In Brown v. Board of Education, 347 U.S. 483, 495 (1954), this Court held that ". . . [T]he plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." In the context of the opinion, it is clear that the Court was referring to state enforced segregation, for reference previously had been made to the fact that "Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children. . . " (Id., p. 494), and additional support was derived from a finding in the Delaware case relating to the effect of "State-imposed segregation" (f.n. 10). Upon reargument, the parties were directed to give consideration to the question:

> ". . . Would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice. . ." (Id., p. 495, f.n. 13).

This language clearly refutes any assumption by this Court that state-mandated integration was to replace state-enforced segregation, for such necessarily follows from a recognition of "normal geographical districting" as a remedy.

In Brown II, 349 U.S. 294, 300 (1955), the Court declared that lower courts "may consider problems arising from. . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non racial basis." Reference was then made to a remand of the cases to the lower courts "to take such proceedings and enter such orders and decrees. . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

In one of the earliest appearances of the cases upon remand, the three-judge court in the South Carolina case, Briggs v. Elliott, 132 F. Supp. 776 (D.C. S.C. 1955) declared, in a holding which has been widely quoted:

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution

or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

In the Brown case itself upon remand, the Kansas court declared:

"Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.

"If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live." Brown v. Board of Education of Topeka, 139 F. Supp. 468 (D.C. Kan. 1955).

In Evans v. Buchanan, 207 F. Supp. 820 (D.C. Del. 1962), the Court held:

"The court holds that the States do not have an affirmative, constitutional duty to provide an integrated education. The pertinent portion of the Fourteenth Amendment of the United States Constitution reads, 'nor [shall any State] deny any person within its jurisdiction the equal protection of the laws.' This clause does not contemplate compelling action; rather, it is a prohibition preventing the States from applying their laws unequally.

"When interpreting the equal protection clause in the Brown case the Supreme Court held only that a State may not deny any person on account of race the right to attend a public school. Chief Justice Warren, speaking for the court said, 'To separate them [Negroes] from others * * * solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' (Emphasis supplied.) The clear implication of this statement is that if races are separated because of geographic or transportation considerations or other similar criteria, it is no concern of the Federal Constitution. Thus, discrimination is forbidden but integration is not compelled."

In a more recent case, a district court in Ohio declared:

"In this cause of action the plaintiffs are requesting the Court to do what the Constitution forbids, that is, to recognize their color and to order them admitted to a school because of that color. Plaintiffs have a constitutional right not to be objects of racial discrimination, and they can vindicate that right in an action before this Court, but they do not have a constitutional right to attend or to refrain from attending a particular school on the basis of racial considerations when there has been no actual discrimination against them. The law is color-blind and, in cases such as this, that principle, which was designed to insure equal protection to all citizens, is both a shield and a sword. While protecting them in their right to be free from racial discrimination, it at the same time denies them the right to consideration on a racial basis when there has been no discrimination." Lynch v. Kenston School District, 229 F. Supp. 740, 744 (D.C. Ohio 1964).

The principle of these cases, that the Constitution does not require integration, was reiterated in almost every case to consider the question in the first decade after Brown.[1]

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1. Allen v. County School Board of Prince Edward County, 249 F2d 462 (C.A. 4th 1957); Aaron v. Cooper, 169 F. Supp. 325, 336 (D.C. Ark. 1959); Aaron v. Tucker, 186 F. Supp. 913 (D.C. Ark. 1960); Borders v. Rippy, 247 F2d 268, 271 (C.A. 5th 1957); Boson v. Rippy, 285 F2d 43 (C.A. 5th 1960); Holland v. Board of Public Instruction, 258 F2d 730 (C.A. 5th 1958); Dove v. Parham, 181 F. Supp. 504 (D.C. Ark. 1960); Kelley v. Board of Education of Nashville, 270 F2d 209 (C.A. 6th 1959), cert. den. 361 U.S. 924; McCoy v. Greensboro Board of Education, 179 F. Supp. 745 (D.C. N.C. 1960), rev'd. on other grounds, 283 F2d 667 (C.A. 4th 1960); Calhoun v. Latimer, 188 F. Supp. 401 (D.C. Ga. 1959); Wheeler v. Durham City Board of Education, 196 F. Supp. 72 (D.C. N.C. 1961); Jeffers v. Whitley, 197 F. Supp. 84 (D.C. N.C. 1961), rev'd. on other grounds, 309 F2d 621 (C.A. 4th 1962); Thompson v. Arlington School District, 204 F. Supp. 620 (D.C. Va. 1962); Jackson v. School Board of Lynchburg, 203 F. Supp. 701 (D.C. Va. 1962); Vick v. County School Board of Obion County, 205 F. Supp. 436 (D.C. Tenn. 1962); Bell v. School City of Gary, 213 F. Supp. 819 (D.C. Ind. 1963) aff'd. 324 F2d 209 (C.A. 7th 1963), cert. den. 377 U.S. 924 (1964); Blakeney v. Fairfax County School Board, 231 F. Supp. 1006 (D.C. Va. 1964); Davis v. East Baton Rouge Parish School Board, 219 F. Supp. 876 (D.C. La. 1963); Gaines v. Dougherty County Board of Education, 222 F. Supp. 166 (D.C. Ga. 1963); Evers v. Jackson Municipal School District, 328 F2d 408 (C.A. 5th 1964); Millier v. Barnes, 328 F2d 810 (C.A. 5th 1964); Monroe v. Board of Commissioners of Jackson, 229 F. Supp. 581 (D.C. Tenn. 1964); Bush v. Orleans Parish School Board, 230 F. Supp. 509, 514 (D.C. La. 1963); Bradley v. School Board of Richmond, 345 F2d 310 (C.A. 4th 1965); Gillian v. School Board of Hopewell, 345 F2d 325 (C.A. 4th 1965); Kier v. School Board of Augusta County, 249 F. Supp. 239, 242 (D.C. Va. 1966); Downs v. Board of Education of Kansas City, 336 F2d 988, 998 (C.A. 10th 1964), cert. den. 380 U.S. 914 (1965); Deal v. Cincinnati Board of Education, 244 F. Supp. 572 (D.C. Ohio 1965), aff'd. 369 F2d 55 (C.A. 6th 1966), cert. den. 389 U.S. 847 (1967); Broussard v. Houston Independent School District, 395 F2d 817 (C.A. 5th 1968); Bowman v. County School Board, 382 F2d 326 (C.A. 4th 1967); Goss v. Board of Education of Knoxville, 270 F. Supp. 903 (D.C. Tenn. 1967); Lockett v. Board of Education of Muscogee County, 342 F2d 225 (C.A. 5th 1965); Avery v. Wichita Falls School District, 241 F2d 230, 233 (C.A. 5th

In an equally formidable array of decisions, racial imbalance arising from the operation of geographical zoning assignment plans has been upheld.[2]

In Deal v. Cincinnati Board of Education, 369 F2d 55 (C.A. 6th 1966), the Court held:

> "Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bais, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is

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1956); Stell v. Savannah-Chatham County Board of Education, 333 F2d 55, 59 (C.A. 5th 1964); and see cases cited in footnotes 10 and 11 of Blocker v. Board of Education of Manhasset, 226 F. Supp. 208 (D.C. N.Y. 1964).

2. Deal v. Cincinnati School Board, supra; Downs v. Board of Education of Kansas City, supra; Henry v. Godsell, 165 F. Supp. 87 (D.C. Mich. 1958); Thompson v. Arlington School Board, supra; Robinson v. Shelby County Board of Education, 311 F. Supp. 97 (D.C. Tenn. 1970); Bell v. School Board of Gary, supra; Monroe v. Board of Comm'rs. of Jackson, 221 F. Supp. 968 (D.C. Tenn. 1963) aff'd. 380 F2d 955 (C.A. 6th 1967), rev'd. on other grounds, 391 U.S. 450 (1968); Webb v. Board of Education of Chicago, 223 F. Supp. 466 (D.C. Ill. 1963); Lynch v. Kenston Board of Education, supra; Craggett v. Board of Education of Cleveland, 234 F. Supp. 381 (D.C. Ohio 1964); Gillian v. School Board of Hopewell, supra; Swann v. Charlotte-Mecklenberg Board of Education, 243 F. Supp. 667 (D.C. N.C. 1965), aff'd. 369 F2d 29 (C.A. 4th 1966); Clark v. Board of Education of Little Rock, 369 F2d 661 (C.A. 8th 1966); Mapp v. Board of Education of Chattanooga, 373 F2d 75 (C.A. 6th 1967); Moses v. Washington Parish School Board, 276 F. Supp. 834 (D.C. La. 1967); Goss v. Knoxville, 406 F2d 1183 (C.A. 6th 1969), and see cases discussed in 11 ALR 3d 780.

acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication. The Supreme Court in Brown recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case. Brown v. Board of Education, 347 U.S. 483, 495 note 13, question 4(a); Brown v. Board of Education, 349 U.S. 294, 300-01 (1955)."

To appellant's contention that all-black schools were illegal, the Court replied:

"We do not accept this contention. The element of inequality, in Brown was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race. The evil inherent in such a classification is that it fails to recognize the high value which our society places on individual worth and personal achievement. Instead, a racial characterization treats men in the mass and is unrelated to legitimate governmental considerations. It fails to recognize each man as a unique member of society."

That this Court's decision in Brown I was based on the presence of an impermissible classification rather than upon any finding of educational injury independent of state-mandated segregation is also borne out by the cases which immediately followed, in which this Court struck down segregation in such unrelated, non-psychologically oriented facilities as parks, Mayor & C. of Baltimore v. Dawson, 350 U.S. 877 (1955), golf courses, Holmes v. Atlanta, 350 U.S. 879 (1955); city busses,

Browder v. Gayle, 352 U.S. 903 (1956); and later, prisons. Lee v. Washington, 390 U.S. 333 (1968).

(c) Assignment of Pupils By Race To Achieve Racial Balance or Desegregation Is Not Required.

> "Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race. . . racial classifications are constitutionally suspect. . . and subject to the 'most rigid scrutiny'. They bear a 'far heavier burden of justification than other classifications.'" Hunter v. Erickson, 393 U.S. 385, 391 (1969).

In Bolling v. Sharpe, 347 U.S. 497, 499 (1954), the assignment of children to schools in the District of Columbia on the basis of race was held to be a violation of due process of law, on the reasoning that "Classifications based solely upon race must be scrutinized with care, since they are contrary to our traditions and hence constitutionally suspect."

In McLaughlin v. Florida, 349 U.S. 184, 196 (1964), a state statute declaring interracial cohabitation illegal was invalidated on the reasoning that "an exercise of the police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race", although "enacted pursuant to a valid state interest, bears a heavy burden of justification"; and can be upheld "only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." In so holding, the Court found support from prior decisions which had invalidated state laws which required designation by race in voting and property records and ballots, and which required segregation in parks.

In striking down the Knoxville, Tennessee minority to majority transfer provision of the system's school desegregation plan, this Court declared:

> "Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment. As the Court said in Steele v Louisville & N.R. Co. 323 U S 192, 203, 98 L ed 173, 184, 65 S Ct 226 (1944), racial classifications are 'obviously irrelevant and invidious.'" Goss v. Board of Education of Knoxville, 373 U.S. 683, 687 (1963).

Just last year, in Alexander v. Holmes County Board of Education, 369 U.S. 19, (1969), the Court directed the lower federal courts in school cases to require school systems to,

> "[B]egin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color" (emphasis supplied).

In 1958, in the Little Rock School case, Cooper v. Aaron, 358 U.S. 1, 19, the Court held that:

> "[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers. . . "

In Rogers v. Paul, 382 U.S. 198 (1965), the Court held that a school desegregation plan under which children were assigned to school on the basis

of race was constitutionally impermissible.

In Loving v. Virginia, 388 U.S. 1, 11 (1967), state miscegenation statutes were declared void under the 14th Amendment on the reasoning that the statutes,

> ". . . [R]est solely upon distinctions drawn according to race."

In the jury discrimination cases, it has been held that "A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venure or jury roll from which petit jurors are drawn." Swain v. Alabama, 380 U.S. 202, 208 (1965).

Similarly, a deliberate effort to limit the number of jurors because of racial considerations is unconstitutional. In Cassell v. Texas, 339 U.S. 282, 286-7 (1950), it was held:

> "We have recently written why proportional representation of races on a jury is not a constitutional requisite. Succinctly stated, our reason was that the Constitution requires only a fair jury selected without regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible." (emphasis supplied) (286).

On the other hand, in Collins v. Walker, 329 F2d 100 (C.A. 5th 1964), an indictment against a Negro was held unconstitutional where it had been returned by a specially empaneled grand jury upon which 6 Negroes were deliberately included, the Court declaring:

> "A Negro is entitled to the equal protection of the laws, no less and no more. He stands equal before the law, and is viewed by the law as a person, not as a Negro. An accused cannot demand a mixed grand jury, some of which shall be of his same race. What an accused is entitled to demand under the Constitution 'is that in organizing the grand jury there shall be no discrimination against him because of his race or color."

In other words, a person may not be included or excluded solely because he is a Negro or because he is white. The requirement is that the system be designed without regard to race, and once the system is so designed, the fortuitous results that arise thereunder in any given instance afford no legitimate cause for complaint just because one race is not represented or is over-represented thereon.

In this case, both Negro and white parents are objecting to being assigned to schools solely on the basis of their race. Either Brown condemns this discrimination, or it means nothing. The protection of the Fourteenth Amendment is not limited to any particular race, nor to any particular type of case. Long ago, this Court rejected the notion that the Fourteenth Amendment was the special property of any particular class, for its provisions were held

to be". . . [U]niversal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race or color. . " Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

The clear meaning of Brown I is that the assignment of Negro pupils to public schools on the basis of race constitutes a classification and discrimination so invidious as to violate the Fourteenth Amendment. In so holding, the Court necessarily held that this was a judgment which was beyond the jurisdiction and power of state legislatures and Congress to make. This, notwithstanding the fact that 17 state legislatures had found the racial classifications to be worthy for reasons valid to them, and that the doctrine had been upheld by this Court on at least six prior occasions, by state courts 59 times, and by lower federal courts 13 times. See 23 Ga. B.J. 9, 27 (1960), where the cases are collected.

To say now that students nevertheless must be assigned to schools on the basis of race for reasons which this Court or any other Court today deems worthy is to assert for the judiciary the very power which was denied to the state legislatures and Congress, and this in spite of the fact that legislatures are presumptively deemed to possess more expertise in formulating questions of policy than the judiciary. It is nothing less than an intolerable affection of superior virtue, and assumes the character of a self-endowed

veto power. See Hand, The Bill of Rights, pp. 54-75. Separate but equal was a valid doctrine for 56 years, and such "an unbroken practice. . . openly and by affirmative state action. . . is not something to be lightly cast aside." Walz v. Tax Commission of New York, 397 U.S. 664 (1970); Jackson v. Rosenbaum, 260 U.S. 22, 31 (1922). Yet, to now uphold enforced racial assignments to achieve racial balance involves the Court in exercising educational policy judgments in an area of social science which is only in its incipiency and in which the concepts are subject to wide disagreement among the experts.[3] As recently stated for the Court by Mr. Justice Black:

> "The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations." Evans v. Abney, 396 U.S. 435 (1970).

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3. See Jensen,"How Much Can We Boost IQ and Scholastic Achievement", 39 Harv. Educ. Rev. 1, 84-5 (1969); Note, "Judicial Supervision of the Color-Blind School Board", 81 Harv. L.R. 1511, 1515 (1968); Fiss,"Racial Imbalance in the Public Schools; The Constitutional Concepts", 78 Harv. L.R. 564, 569 (1965); Kaplan,"Segregation Litigation and the Schools, Part II; The General Northern Problem," 54 N.W.U.L.R. 157, 175 (1963); Du Bois,"Does The Negro Need Separate Schools?", 4 Jour. Negro. Ed. 328, 331 (1935); U.S. Department of Health Education and Welfare, Office of Education, "Equality of Educational Opportunity," pp. 20-30; 307 (1966) (Coleman Report), and see article in the New York Times Magazine of May 2, 1965, by Martin Mayer, where it was said: "Not long ago, many of us felt that a large share of the Negro failure in the schools was itself the product of segregation; but almost nobody whose opinion is worth considering believes it today."

If the position of respondents is not correct, then the courts have come full-cycle from Brown: There, racial classifications were prohibited by the Constitution; now, they are held to be demanded by the same Constitution. If the rule is to be that racial classifications are illegal except those looked upon with favor by the Court, then it is no longer the Constitution which is the Supreme law of the land, but the transient views of the individuals who happen to occupy judicial office at any particular time.

The danger of such a doctrine, under which the Courts can pick and choose as between racial classifications deemed "benign" and those considered injurious, is that it opens the door for future courts to elevate to constitutional doctrine the racial policies of an Adolph Hitler under the guise of giving recognition to the latest theories of social science. "Every journey to a forbidden end begins with the first step. . . " Carter v. Carter Coal Company, 298 U.S. 238, 295 (1936).

Respondents do not construe the later decisions of this Court to require a different result.

In Green v. School Board of New Kent County, 391 U.S. 430, 437 (1968), it was held that the school board there was "charged with the

affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Reviewing the operation of the free choice plan in effect there, this Court held it inadequate. But the holding that the Board was under an "affirmative duty" to disestablish the dual system and convert to a unitary system is not tantamount to a holding that a school board must in all events place children of different races in the schools, or that the sufficiency of a plan is tested by the amount of actual mixing it produces. The problem with the free choice plan in New Kent was that it was not in fact "free". The system continued to assign faculty on a racial basis, and to operate its transportation system and all extracurricular activities on a segregated basis. It has long been the law that faculty segregation and other positive, discriminatory aspects of a school's operation render a freedom of choice plan defective, in that the very existence of such open evidences of continuing racial classification tend to discourage free exercise of the choice: "Faculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system." Clark v. Board of Education of Little Rock School District, 369 F2d 661, 669 (C.A. 8th 1966); United States v. Jefferson County Board of Education, 372 F2d 836, 883-5 (C.A. 5th 1966), adhered to on rehearing, 380 F2d 385 (1967), cert. den. sub nom. Caddo Parish School Board v. United States, 389 U.S. 840 (1967). "Unquestionably, to be constitutionally acceptable, a freedom

of choice plan will impose upon the school boards additional duties not required under a geographic plan." Kier v. County School Board of Augusta County, 249 F. Supp. 239, 247 (D.C. Va. 1966). "[T]he presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored school' just as certainly as if the words were printed across its entrance in six inch letters." Brown v. County School Board, 245 F. Supp. 549, 560 (D.C. Va. 1965).

More significant, in New Kent, the free choice plan did not require that pupils exercise their choice annually, and where they failed to do so, the school authorities simply reassigned these pupils to the school previously attended, thereby affirming the existing assignments which had been made on a racial basis.[4]

In Raney v. Board of Education of Gould School District, 391 U.S. 443, 445 (1968), the same situation prevailed—segregated faculty, continuation of assignments previously made on a racial basis where the choice was not exercised — plus one additional factor: When overcrowding of the previously all-white school occurred, the board rejected the application of Negro pupils without according priority on a proximity basis without regard to race, which is a recognized requirement in such cases. See

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4. See Brief of Petitioners in Green v. County School Board of New Kent County, supra, at pages 4-6, where these circumstances are related in full.

Stell v. Savannah-Chatham County Board of Education, 333 F2d 55, 65 (C.A. 5th 1964); United States v. Jefferson County Board of Education, supra, 372 F2d at 891.

In Monroe v. Board of Commissioners of Jackson, 391 U.S. 450, 454-5, the Board superimposed a freedom of choice plan upon a zoning plan, but the evidence here also disclosed racial discrimination not only in the allocation of faculty, but also in the assignment of pupils and the structuring of the zone lines. Consequently, the free choice plan did not meet the essential requirements of a valid freedom of choice plan, but was tantamount to initially assigning pupils on the basis of race.

On two subsequent occasions, the Court of Appeals for the Sixth Circuit has construed this Court's opinion in Monroe as not upsetting its previous holding to the effect that the Constitution does not require integration. Goss v. Board of Education of Knoxville, 406 F2d 1183 (C.A. 6th 1969); Deal v. Cincinnati Board of Education, 419 F2d 1387 (C.A. 6th 1969).

Consequently, in all of these three cases, the free choice plans were in fact found to be something other than "free". In all three cases, the boards of education were still engaged in positive acts of racial discrimination. The cases therefore do not stand for the proposition that

racial imbalance per se is illegal, even in a so-called de jure state.

This Court's more recent decisions in Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969), Dowell v. Board of Education of Oklahoma City, 396 U.S. 269 (1969); Carter et al v. West Feliciana Parish School Board, 396 U.S. 290 (1970) and Northcross v. Board of Education of Memphis, 397 U.S. 232 (1970) dealt not with the scope of desegregation, but with the timing. However, in Alexander, as pointed out by Chief Justice Burger's concurrence in Northcross, this Court did redefine the requirements of desegregation in more traditional language, for the school boards there involved were directed to begin operation immediately "as unitary school systems within which no person is to be effectively excluded from any school because of race or color."

If the Constitution now affirmatively requires an actual mixing of the races in the schools, it is not because of anything this Court has heretofore held, and such a holding would involve substantial rewriting of the Fourteenth Amendment.

To begin with, the language of the Amendment is negative - not positive: "[N]or shall any state. . . deny to any person within its jurisdiction the equal protection of the laws."

". . . [I]t cannot be said that the 14th Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." Owenby v. Morgan, 256 U.S. 94, 112 (1921).

The amendment was obviously designed as a shield. If construed to require an affirmative assignment of children to schools on the basis of race, it has now been converted into a sword.

At the outset, we should distinguish several points which are not disputed here.

First, viewed in any light, Brown clearly does not permit even an initial assignment of Negro children to schools on a segregated basis, notwithstanding the fact that provisions may be made by a "pupil transfer" - type assignment plan whereby the child may remove himself from the school where he was racially assigned by state authorities.[5] "Negro

5. Bush v. Orleans Parish School Board, 308 F2d 491 (C.A. 5th 1962); Green v. School Board of Roanoke, 304 F2d 118 (C.A. 4th 1962); Davis v. Board of Education of Charleston, 216 F. Supp. 295 (D.C. Mo. 1963); Bell v. School Board of Powhatan, 321 F2d 494 (C.A. 4th 1963); Buckner v. School Board of Greene County, 332 F2d 452 (C.A. 4th 1964); Brown v. School Board of Frederick County, 234 F. Supp. 808 (D.C. Va. 1964); Marsh v. School Board of Roanoke, 305 F2d 94, 98 (C.A. 4th 1952); United States v. Jefferson County Board of Education, supra, 372 F2d at 890-1; Wheeler v. Durham Board of Education, 346 F2d 768 (C.A. 4th 1965); Bell v. School Board of Staunton, Virginia, 249 F. Supp. 249 (D.C. Va. 1966).

children can not be required to apply for that to which they are entitled as a matter of right." Northcross v. Board of Education of Memphis, 302 F2d 818 (C.A. 6th 1962).

Secondly, nor can it be contended that a school system may continue to utilize dual school zones,[6] or condition the admission of Negro children to white schools on their successfully withstanding intelligence tests and other admission requirements not imposed upon white children.[7] The foregoing principles respondents concede, although it should be observed that at an early period in the desegregation process this Court did uphold a pupil "placement" or "transfer" plan which provided for the initial assignment of Negro pupils to their old schools with the right to transfer out upon applying and satisfying a long list of criteria. Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372 (D.C. Ala. 1958), aff'd. 358 U.S. 101 (1958).

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6. Northcross v. Board of Education of Memphis, 302 F2d 818 (C.A. 4th 1962); Nesbit v. Statesville Board of Education, 345 F2d 333 (C.A. 4th 1965); Kemp v. Beasley, 352 F2d 14 (C.A. 8th 1965); Brown v. County Board of Frederick County, 346 F2d 22 (C.A. 4th 1965).

7. Hamm v. County School Board of Arlington County, 264 F2d 945 (C.A. 4th 1959); Jones v. Alexandria School Board, 278 F2d 72 (C.A. 4th 1960); Allen v. School Board of Charlottesville, 203 F. Supp. 225 (D.C. Va. 1961).

Nor can it be disputed that a free choice plan would not be sufficient if enmeshed in a pattern of violence or intimidation.[8]

But these cases are a far cry from the interpretation being placed upon the "affirmative duty" language of this Court's opinion in Green (391 U.S. at 437), as will be discussed momentarily. First, however, there are four other categories of decisions which require consideration here.

First, a few cases have held unqualifiedly that the Fourteenth Amendment requires some semblance of racial balance regardless of whether any acts of state discrimination are present:[9] "The central

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8. Coppedge v. Franklin County Board of Education, 394 F2d 410 (C.A. 4th 1968); United States v. Elloree School District, 283 F. Supp. 557 (D.C. S.C. 1968); Singleton v. Anson County Board of Education, 283 F. Supp. 895 (D.C. N.C. 1968).

9. Hobson v. Hansen, 269 F. Supp. 401 (D.C. D.C. 1967), vacated, 408 F2d 175 (C.A. D.C. 1969); Branche v. Board of Education of Hempstead, 204 F. Supp. 150 (D.C. N.Y. 1962); Barksdale v. Springfield School Committee, 237 F. Supp. 543 (D.C. Mass. 1965), disapproved, 348 F2d 261 (C.A. 1st 1965); Spangler v. Pasadena Board of Education, 311 F. Supp. 501 (D.C. Cal. 1970); Jackson v. Pasadena School District, 59 Cal. 2d 876, 382 P2d 878 (1963); Blocker v. Board of Education of Manhasset, 226 F. Supp. 208 (D.C. N.Y. 1964); Davis v. School District of Pontiac, 309 F. Supp. 734 (D.C. Mich. 1970).

constitutional fact is the inadequacy of segregated education. That it is not coerced by direct action of an arm of the state cannot alone, be decisive of the issue of deprivation of constitutional right. . . . The educational system that is thus compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept an indurate segregation on the ground that it is not coerced or planned but accepted. . . . Failure to deal with a condition as readily inflicts it as does any grosser imposition of it." Branche v. Board of Education of Hempstead, supra (204 F. Supp. at 153). "But that is not the question (a duty to remedy de facto segregation). The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system." Barksdale v. Springfield School Committee, supra (237 F. Supp. at 546).

Second, other cases utilize language similar in nature, but which is of dubious consequence because of being uttered in the context of a finding of deliberate, state sponsored discrimination.[10]

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10. Taylor v. New Rochelle Board of Education, 191 F. Supp. 181 (D.C. N.Y. 1961), S.C. 195 F. Supp. 231 (1961), aff'd. 294 F2d 36 (C.A. 2nd 1961), cert. den. 368 U.S. 940 (1961); S.C., 221 F. Supp. 275 (1963); Dowell v. School Board of Oklahoma City, 219 F. Supp. 427 (D.C. Okl. 1963), aff'd 375 F2d 158 (C.A. 10th 1967); S.C. 244 F. Supp. 1965 (1965), cert. den. 387 U.S. 931 (1967); United States v. School District 151, 301 F. Supp. 201 (D.C. Ill. 1969); S.C., 286 F. Supp. 786 (1968), aff'd. 404 F2d 1125 (C.A. 7th 1969); Swann v. Charlotte-Mecklenberg Board of

Third, some cases, while declaring that the Constitution does not require integration, uphold voluntary efforts of state authorities to assign pupils on the basis of race so as to overcome racial imbalance.[11]

Fourth, seizing upon this Court's "affirmative duty" language in the Green triology, and in the case of the Fifth Circuit, upon the sweeping, doctrainaire generalizations of United States v. Jefferson County Board of Education, supra, some courts have increasingly echoed the affirmative duty concept, and relying upon a de facto, de jure distinction, tested the sufficiency of desegregation plans upon a quantitative basis, and held that a plan which does not in fact bring about mixing in the classroom is defective without more. See, for example, Kemp v. Beasley, 389 F.2d 178 (C.A. 8th 1968); U. S. V. Hinds County Board of Education, 402 F2d 926 (C.A. 5th 1968); S.C., 423 F2d 1264 (1969); S.C. 417 F2d 853 (1969); Singleton v. Jackson Municipal Separate School District, 419 F2d 1211

Education, 300 F. Supp. 1291 (D.C. N.C. 1969), S.C., 306 F. Supp. 1291 (1969); S.C., 306 F. Supp. 1299 (1969); S.C. 311 F. Supp. 265 (1970), rev'd. in part, ____F2d____(C.A. 4th 1970), certiorari pending; Keyes v. School District No. 1 of Denver, 30. F. Supp. 289 (D.C. Colo. 1969).

11. Olson v. Malverne, 250 F. Supp. 1000 (D.C. N.Y. 1966); Offerman v. Nitkowski, 248 F. Supp. 129 (D.C. N.Y. 1965); Norwalk CORE v. Norwalk Board of Education, 298 F. Supp. 213 (D.C. Conn. 1968); Tometz v. Board of Education, 39 Ill. 2d 593, 237 N.E. 2d 498 (1968); Balaban v. Rubin, 242 NYS 2d 973, 40 Misc. 2d 249 (1963), rev'd. 144 NY 2d 193, 199 N.E. 375 (1964), cert. den. 379 U.S. 881 (1964); Fuller v. Volk, 230 F. Supp. 25 (D.C. N.J. 1964); S.C. 250 F. Supp. 81 (1966); Addabbo v. Donovan, 26 App. Div. 2d 383, 256 N.Y.S. 2d 178 (1965), aff'd. 16 N.Y. 2d 619, 209

(C.A. 5th 1969); S.C., 246 F2d 1364 (1970); S.C., ____F2d___(1970); Valley v. Rapides Parish School Board, 423 F2d 1132 (C.A. 5th 1970); Hall v. St. Helena Parish School Board, 424 F2d 320 (C.A. 5th 1970); Nesbit v. Statesville City Board of Education, 418 F2d 1040 (C.A. 4th 1969); Bivins v. Bibb County Board of Education, 424 F2d 97 (C.A. 5th 1970); Hilson v. Ouzts, 421 F2d 632 (C.A. 5th 1970); Walker v. County School Board of Brunswick County, 413 F2d 53 (C.A. 4th 1969); Felder v. Harnett County Board of Education, 409 F2d 1070 (C.A. 4th 1969); Davis v. School Commissioners of Mobile, 414 F2d (C.A. 5th 1969); S.C. ____F2d____(C.A. 5th 1970). "Black nationalists and white racists notwithstanding, school integration is relevant: It is an educational objective as well as a constituional imperative." Henry v. Clarksdale Municipal Separate School District, 409 F2d 682, 689 (C.A. 5th 1969). ". . . [A] point has been reached in the process of school desegregation where it is not the spirit, but the bodies which count." United States v. Indianola Separate School District, 410 F2d 626, 631 (C.A. 5th 1969).

The Fifth Circuit has even advanced to the extent of holding the existence of a single all-Negro school unconstitutional. Adams v. Matthews, 403 F2d 181, 188 (C.A. 5th 1968); Henry v. Clarkesdale Municipal Separate School District, supra, at p. 689; United States v. Hines County School Board, 417 F2d 853 (C.A. 5th 1969); Hall v. St. Helena Parish School Board, 417 F2d 801, 807 (C.A. 5th 1969). However

N.E. 2d 112, cert. den. 382 U.S. 905 (1965); Booker v. Board of Education, 45 N.J. 161, 212 A2d 1 (1965), School Committee of Boston v. Board of Education, 352 Mass. 693, 227 N.E.2d 729 (1967), and see, 11 ALR 3d 780.

the Fifth Circuit later modified this by holding that all-Negro schools might be "abolished" by assignment of white pupils for a part of the day. United States v. Board of Education of Baldwin County, 417 F2d 848 (C.A. 5th 1969); Hightower v. West, ___F2d___ (C.A. 5th 1970), and at least one panel of the Court seems to have abandoned it altogether in the context of neighborhood zoning plans in metropolitan areas. See Ellis v. Board of Instruction of Orange County, Florida, 423 F2d 203 (C.A. 5th 1970); Mannings v. Board of Public Instruction of Hillsborough County, 427 F2d 874 (C.A. 5th 1970). On the other hand, an entirely different rule seems to be applicable to rural systems. Andrews v. City of Monroe, 425 F2d 1017 (C.A. 5th 1970); Henry v. Clarkesdale Municipal Separate School District, supra. Hardly does one decision receive circulation until something new is articulated. One test was stated in terms of whether there is "a reasonable alternative" offering more promise of success, and whether or not the plan results in "a substantial number of Negro students (receiving) their entire public school education in a segregated school environment. . . " Singleton v. Jackson Municipal School District, 426 F2d 1364 (C.A. 5th 1970); Taylor v. Quachita Parish School Board, 424 F.2d 324 (C.A. 5th 1970).

Bona fide neighborhood zoning plans have been struck down under the de facto - de jure distinction which unquestionably would be upheld in

any state outside the South, on the reasoning that the plans do not in fact bring about mixing. Davis v. Board of Commissioners of Mobile County, 393 F2d 690 (C.A. 5th 1968); United States v. Greenwood School District, 406 F2d 1086 (C.A. 5th 1969); Henry v. Clarksdale Municipal Separate School District, 409 F2d 682 (C.A. 5th 1969); United States v. Indianola Municipal Separate School District, 410 F2d 626 (C.A. 5th 1969); Clark v. Board of Education of Little Rock, 426 F2d 1035 (C.A. 8th 1970).

Eroneously seizing upon this court's affirmance in United States v. Montgomery County Board of Education, 395 U.S. 225 (1969) as laying down a general rule for all cases, the Court has gone all the way from requiring across the board faculty ratios of one in each school, United States v. Jefferson County Board of Education, supra (372 F2d at 900); one in five, United States v. Board of Education of Baldwin County, 417 F2d 848 (C.A. 5th 1969); one in three, United States v. Choctaw County Board of Education, 417 F2d 838 (C.A. 5th 1969); to proportional representation in each school in the same ratio as the faculty ratio of black to white for the system as a whole. Singleton v. Jackson Municipal Separate School District, supra, (419 F2d 1211).

Not to be outdone in the numbers game, the district court in the Norfolk case required student desegregation to the "approximate minimum of 10% where possible" Beckett v. School Board of Norfolk, 308 F. Supp.

1274 (D.C. Va. 1969), only to be reversed by the Court of Appeals on the reasoning that limiting of Negro enrollment in any school to 40% constitutes invidious discrimination.____F2d_____ (en banc, June 22, 1970). In the Charlotte case now before this Court, the district court has decreed racial balance in each school while at the same time disavowing any purpose to do so, only to be followed by the Court of Appeals' modifying opinion holding that this is permissible provided it is "reasonable". But perhaps the grand prize should go to the district court in the Northern District of Georgia which, in an unreported decision in United States v. State of Georgia, C.A. 12972, has placed 81 school systems in Georgia under a decree requiring that 75% of each system's minority students be in attendance at "desegregated schools", defined as a school at wh ich minority enrollment is not less than 50 nor more than 150% of the system wide minority percentage.

Lastly, still pursuing its asserted power to formulate uniform decrees in these cases, the Fifth Circuit has now required that each plan make provision for appointment of a bi-racial advisory committee, and a majority-to-minority transfer option with priority for space and school-furnished transportation. Singleton v. Jackson Municipal School District, 426 F2d 1364 (1970); Davis v. Board of School Comm'rs. of Mobile, ___F2d____(1970); Hightower v. West, ___F2d____ (1970); Mannings v. Board of Public Instruction, 427 F2d 874, 878 (1970).

It is respondents' position that it is beyond the power of any court or HEW to require that there be an actual mixing of the races in the public schools regardless of the circumstances. While respondents deny the power of a school board voluntarily to assign pupils so as to overcome racial imbalance even as a matter of uncoerced, educational policy, supra, p. 37, f.n. 11, it is not necessary for this Court to go this far in order to find in favor of respondents in this case. The Court need only hold here that HEW coult not require it. The Constitution merely prohibits discrimination. If discrimination is lacking, and the system is structured on a non-racial basis, it is likely in most cases that Negro and white pupils will attend schools together, but the fact that in any given system or school they do not should not mean that the Constitution has been violated. But this is precisely the effect of recent decisions in the Fifth, Fourth and Eighth Circuits, in varying degrees.

None of these decisions undertake to articulate a rationale for this doctrine. It may be that these cases purport to lay down a special rule for formerly de jure states only. We hope, however, that we have shown elsewhere in this brief that (a) the de facto - de jure distinction is not a valid one; (b) the distinction has no practical difference as far as the minority pupil suffering from racial isolation is concerned, and (c) in any event, the constitution does not permit the rights of minority children to be vindicated by depriving the majority children of the same rights.

It is submitted, however, that the rationale of the cases requiring integration rather than freedom from state-enforced segregation is not merely a flimsy de jure distinction, but rather, a judicial assumption that the educational and psychological development of the minority child is retarded by racial isolation per se, and that this condition can be alleviated only by an affirmative program of integration achieved at all costs.[11A] This rationale would invoke the principle of Griffin v. Illinois, 351 U.S. 12, 17 (1956), to the effect that "[A] law nondiscriminatory on its face may be grossly discriminatory in its operation," (f.n. 11), and that "Failure to deal with a condition as readily inflicts it as does any grosser imposition of it," Branche v. Board of Education, supra, p. 36.

This proposition necessarily would cut across all de jure - de facto distinctions, and result in a principle which would equally affect all states in the nation. Whether or not such a duty exists requires this Court to resolve a question which has not been made clear, but which respondents submit the Court now can no longer avoid, and that is: What is the holding of Brown, (1) That racial classifications for the purpose of public education are constitutionally impermissible, or (2) That the Constitution requires equal educational opportunity? If the latter is correct, then freedom from state enforced segregation is not enough, and racial isolation

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11A. Respondents do not concede the validity of this premise, i.e., that minority children do suffer educational disadvantage from racial isolation. See page 27, n. 3, supra. However, because respondents consider that this is the reasoning behind most of the recent decisions, we must answer it here.

is per se unconstitutional regardless of the underlying cause. Until this basic question is resolved, the lower courts will continue to founder in seas of conceptual uncertainty. Already, this uncertainty has played havoc with public education. Conflicting opinions often come down within the same month. School boards are repeatedly told that what they are doing is not enough, but they are never told what "enough" consists of. As a result, teachers, administrators and students are deserting the public schools en masse.

Elucidation of the question requires an examination of the "equal educational opportunity" doctrine. For example, one district court in Illinois stated it this way:

> "The separation of black and white children is in itself an inhibiting factor. In any community where one school is black and one predominantly white nobody needs to be told which is considered the good school. This is the case whether segregation is the result of an old housing pattern, the flight of white residents or the construction of a new school on a site beyond the walking distance of Negro children. The implication, and not infrequently the assertion, that the Negro school is 'undesirable' disheartens both pupils and teachers and limits their expectations. Because it saps the pupils' motivation, his achievement,

level drops below his actual capacity and gives ostensible confirmation to the fear that he is somehow deficient." United States v. School District 151, 301 F. Supp. 201, 205 (D.C. Ill. 1969).

Another court expressed it somewhat differently, viz.:

"The minority citizens are products, in many instances, of parents who received inferior educations and hence the home environment which is looked to for many fundamental sources of learning and knowledge yields virtually no educational value. Thus, the only hope for raising the level of these students and for providing them the equal education which the Constitution guarantees is to bring them into contact with classroom associates who can contribute to the learning process; it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students." Keyes v. School District No. 1 of Denver, 313 F. Supp. 90, 96-7 (D.C. Colo. 1970).

It is submitted that such decisions are not only beyond the power of the judiciary to make, but are also fraught with grave consequences for white and black children as well as the courts.

To the Negro child, the concept would seem to brand him with the very thing which it ostensibly seeks to erase - the stigma of inferiority - for that is precisely the underpinning of the doctrine. Stripped of all psychological jargon, the doctrine comes down to this: The Negro is inferior,

and can be elevated only by association with his superiors. (No one has yet contended that such association helps the white child educationally.[12])

Some Negro leaders have recognized the doctrine for what it is. Stokely Carmichael was recently quoted as protesting against forced integration with the observation that "if integration means that moving to something white is moving to something better, then integration is a subterfuge for white supremacy." Leiberman, "Teachers and the Fourteenth Amendment," 46 N.C.L.R. 313, 328 (1968). See also 31 Mo. L.R. 391, 411 (1961). In the context of racial classifications, "equal application" is not enough, and a classification predicated upon an assumption of white supremacy is unconstitutional. Loving v. Virginia, 388 U.S. 1, 8, 11 (1967).

From the standpoint of the white parents, it is submitted that their children cannot, consistent with the liberty guaranteed by the due process clause, be utilized by the state as a catalyst for the benefit and improvement of someone else's children. "The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experiences during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations

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12. See Beckett v. School Board of Norfolk, 308 F. Supp. 1274, 1281 (D.C. Va. 1969).

upon the power of the state, and conflict with rights assured to plaintiff in error." Meyer v. Nebraska, 262 U.S. 390, 402 (1923). "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children. . . The child is not the mere creature of the state; those who nuture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). "The present case then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . ", and ". . . a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Griswold v. Connecticut, 381 U.S. 479, 485 (1965). "In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the federal government or the states is not restricted to rights specifically mentioned in the first eight amendments". Griswold v. Connecticut, supra, p. 493 (Goldberg, concurring).

In this case, unlike most school cases, objecting parents, both black and white, are parties of record, thereby insuring that "concrete adverseness which sharpens the presentation of issues upon which the court

so largely depends for illumination of difficult constitutional questions", Flast v. Cohen, 392 U.S. 83, 99 (1968); Jenkins v. McKeithen, 395 U.S. 411, 423 (1969), and consequently, it is not unusual that no previous cases have considered the questions from the vantage point presented here. Respondents do not claim that they have a constitutional right to choose the particular school which they are to attend. They do contend that due process prevents their being arbitrarily assigned for any reason which government may decide upon, and that their assignment on the basis of race for the professed purpose of creating a homogeneous society desired by the dominant political voice of the day is just as arbitrary and unreasonable as the notion of Plato that all wives and children should be held in common, referred to in this Court's opinion in Meyer v. Nebraska, supra.

Not only does the doctrine of forced integration portend mischief for students, but it also places this court in an impossible position. Assuming that racial isolation in the schools gives rise to constitutional deprivation, what is to be done in the District of Columbia and all of the other metropolitan areas referred to in the Amicus brief of the State of Georgia filed in this case (Brief, pp. 7-10) which show a progressively advancing degree of isolation of Negro pupils, already exceeding 50% in 11 of the Nation's major cities? It would result that a large part of the Negro children in our public schools would be suffering from a deprivation

which no Court was capable of remedying. It is certainly irresponsible for a court to tell the Negro community that an integrated education is indispensable to a quality education "when it has neither the power nor the resources to create the necessary prerequisite." McBryde, "Constitutional Law, De Facto Segregation: The Courts and Urban Education," 46 N.C.L.R. 89 (1967).

Moreover, what court is possessed of the necessary expertise to resolve the troublesome educational problems which such a holding entails? As has been well expressed:

> "A more serious problem arises from the nature of the factual determinations which the Court must make. A court applying the. . . doctrine must necessarily resolve disputed issues of educational policy by determining whether integration by race or class is more desirable; whether compensatory programs should have priority over integration; whether equalization of physical facilities is an efficient means of allocating available resources for the purpose of achieving overall equal opportunity. There is a serious danger that judicial prestige will be committed to ineffectual solutions, and that expectations raised by Hobson-Like decisions will be disappointed. Furthermore, judicial intervention risks lending unnecessary rigidity to treatment of the social problems involved by foreclosing a more flexible experimental approach." Comment, Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board, 81 Harv. L.R. 1511, 1525 (1968).

This clearly does not present a case for which "judicially-manageable standards" are reasonably to be articulated. Baker v. Carr, 369 U.S. 186, 226 (1962). As stated by the Court of Appeals for the First Circuit in rejecting the contention that a constitutional right exists to attend mixed schools, "The difficulties prophesied in applying the relatively simple rule of 'one man, one vote' would seem small in comparison". Springfield School Committee v. Barksdale et al, 348 F2d 261, 264 (C.A. 1st 1965). And, as recently observed by Professor Freund, the problem of minority deficiencies is more appropriately met by framing "programs of aid in terms of reaching the most disadvantaged segment of the community", than by affording preferential treatment. Freund, "Civil Rights and The Limits of Law," 14 Buff. L.R. 199, 204 (1964).

Nor can the doctrine justifiably be limited to formerly de jure states as held in United States v. Jefferson County Board of Education, supra, 372 F2d at 873, for if racial isolation is injurious to minority pupils, it would make no difference whether as a historical matter its genesis is traceable to law or neighborhood patterns. School desegregation laws have been void for over 16 years. Is it reasonable to assume that a Negro child in an all-black school in Chicago does not suffer from the racial isolation whereas a Negro child in Georgia does? Do school age children appreciate the conceptual differences between de jure and de facto?

Aside from this, racial isolation in any state can be traced back to some vestige of state action if one is inclined to look very hard. Almost all states at one time enforced restrictive covenants, and zoning laws, federal housing programs and urban renewal programs were racially oriented; also, the conscious adoption by the state of a neighborhood school plan within the context of known, existing residential segregation is itself such "a significant involvement" by the state as to inject 14th Amendment state action. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). See Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts," 78 Harv. L.R. 564, 584 (1965)[13]; Spangler v. Pasadena Board of Education, 311 F. Supp. 501, 512 (D.C. Calif. 1970); Swann v. Charlotte-Mecklenberg Board of Education, 306 F. Supp. 1299 (D.C.N.C. 1969), rev'd. in part, ____F2d____(1970); Dowell v. School Board of Oklahoma City, 219 F. Supp. 427, 433 (D C. Okl. 1963), aff'd. 375 F2d 158 (C.A. 10th 1967), cert. den. 387 U.S. 931 (1967). "If residential racial discrimination exists, it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination." Brewer v. School Board of Norfolk, 397 F2d 37, 41-2 (C.A. 4th 1968). As this Court noted in Brown I, "But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent

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13. "It is the thesis of this article that the labels 'de facto segregation' and 'state action' only obscure the issue of governmental responsibility, and that in every case of racially imbalanced schools sufficient responsibility can be ascribed to government to satisfy the requirement that stems from the equal protection clause's proscription of unequal treatment by government." 78 Harv. L.R. at 584.

that such segregation has long been a nationwide problem, not merely one of sectional concern." 347 U.S. at 491, f.n. 6. And, in Gaston County North Carolina v. United States, 395 U. S. 285, 293-6 (1969), this Court assumed without qualification that a segregated education as far back as 1908 would continue to exert deleterious effects today.

(d) The Assignment Of Children By Race Can Not Be Justified Under The "Disestablishment" Cases Or As A Means Of Remedying The Effects Of Past Discrimination.

The justification for assignment of pupils by race, at least in a so-called "de jure" state, is that while the state under normal circumstances would not be required to do this, it is compelled to do so where segregation previously was mandated by law, under either or both of two doctrines: (1) The "disestablishment" decisions, and (2) As a means of eradicating the effects of past discrimination.

With respect to "disestablishment", reliance is usually posited upon cases holding that in anti-trust actions, the Court may go beyond a prohibitory injunction, and order dissolution and stock divesture as appropriate remedies. See United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944), Schine Chain Theatres v. United States, 334 U.S. 110, 126-130 (1948) and Standard Oil Company v. United States, 221 U.S. 1, 77

(1910). In these cases, however, the Courts deal with persons or entities all of whom are wrongdoers. As stated in United States v. Crescent Amusement Company, supra,

> "These who violate the act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." (323 U.S. at 189).

In the school cases, as here, however, it is not the wrongdoers who are complaining, but innocent parties whose constitutional rights not to be discriminated against on the basis of race are being violated as a means ostensibly of affording the self-same rights to other pupils whose supposed injury was inflicted not by the objecting pupils, but by the agents of the state, over whom the objecting parties have no control.

With respect to the second basis of justification, i.e., eradicating the effects of past discrimination, reliance is usually reposed in the doctrine first definitively described in United States v. Jefferson County Board of Education, supra, 372 F2d at 876, and its lifting of the doctrine from the voting cases under the "freezing principle."

The "freezing principle" employed in the voting cases for the proposition that where discrimination is shown to exist, the Court is empowered to eradicate the effects of the past discrimination, Louisiana v.

United States, 380 U.S. 145, 13 L.Ed. 2d 709 (1965); United States v. Ward, 349 F. 2d 795 (C.A. 5th 1965); United States v. Lynd, 349 F. 2d 785 (C.A. 5th 1965); United States v. Ward, 345 F. 2d 857 (C.A. 5th 1965); United States v. Parker, 236 F. Supp. 511 (D.C. Ala. 1964); United States v. Mississippi, 339 F.2d 279 (C.A. 5th 1964); United States v. Ramsay, 331 F. 2d 824 (C.A. 5th 1964); United States v. Atkins, 323 F.2d 733 (C.A. 5th 1963); United States v. Penton, 212 F. Supp. 193 (D.C. Ala. 1962); United States v. Duke, 332 F. 2d 759 (C.A. 5th 1964), does not support the affirmative assignment of respondents to overcome racial imbalance, for the simple reason that two wrongs do not make a right, and objecting pupils in 1970 may not be discriminated against on the basis of race by being assigned according to racial quotas in order to overcome the effects of supposed discriminatory assignments made in the past by other school officials over which they had no control.

In the "freezing" cases, this Court held merely that because otherwise valid state registration requirements had not been applied to white voters, they also could not be applied to Negro voters, so as to undo the effects of past discrimination. The effect was to relieve Negroes of burdens imposed by state law, not because those burdens were themselves invalid, but because in practice they had not been applied to white voters, and relieving Negroes of compliance therewith was the only feasible method

of achieving equal protection. This Court did not hold, however, that having found that Negro voters were subjected to discriminatory treatment, the white voters also must be subjected to such treatment, which is tantamount to what is sought to be required here. The voting cases stand for the proposition that the discriminatee is entitled to the favored treatment; not that he is entitled to demand that the favored class also be deprived of their rights of equal protection.

Even granted that it is desirable or necessary to overcome the effects of past racial assignments, this legitimate end can not be accomplished by means that transcend the Constitution. What was said in Buchanan v. Warley, 245 U.S. 60, 81 (1917), is pertinent here, to wit:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

And, as stated in Oyama v. California, 332 U.S. 633, 646 (1948):

> "But assuming, for purposes of argument only, that the basis (requirement) is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it."

And, in Cooper v. Aaron, 358 U.S. 1, 16 (1958) after quoting from Buchanan, the Court held that mob violence was no valid basis for setting aside a desegregation plan, declaring.

> "Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights."

And, in First Amendment Cases, the Court has evolved the rule that the public peace can not be preserved by depriving the speaker of his freedom to speak because of fear that others disagreeing therewith may resort to violence, Wright v. Georgia, 373 U.S. 284, 293 (1963), for "constitutional rights may not be denied simply because of hostility to their assertion or exercise." Watson v. Memphis, 373 U.S. 526, 535 (1963); Cox v. Louisiana, 379 U.S. 536 (1965).

Here, the constitutional end of overcoming the effects of past discrimination can not be achieved by depriving teachers of their constitutional rights. As said in Olson v. Board of Education of Union Free School District No. 12, 250 F. Supp. 1000 (D.C. N.Y. 1966), app. dismissed, 367 F2d 565 (C.A. 2nd 1966):

> "In attempting to formulate a plan which will provide equal educational opportunities to a minority group, it is elementary that the plan should not at the same time deprive the majority group of its constitutional rights. 'The constitutional rights of one class of citizenry may not

be sacrificed or suppressed in order to vindicate or render more secure the constitutional rights of another class' (Addabbo v. Donovan, supra, 22 A.D. 2d, p. 390, 256 NYS 2d p. 185). This principle was clarified in Springfield School Committee v. Barksdale, 1 Cir. 1965, 348 F2d 261, where the Court said: * * * * When the goal is to equalize educational opportunity for all students, it would be no better to consider the Negro's special interests exclusively than it would be to disregard them completely.' (p. 264)".

And, as recently declared by the Sixth Circuit:

"Appellants are not the only children who have constitutional rights. There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not to be forced against their will to travel out of their neighborhoods in order to mix the races." Deal v. Cincinnati Board of Education, 419 F2d 1387 (C. A. 6th 1969).

(2) The Assignment of Children on the Basis of Race to Overcome Racial Imbalance is in Violation of the Civil Right Act.

Section 401 of the Civil Rights Act of 1964 declares that "Desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance," 42 USCA 2000c, and Section 407a provides that "Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any

school by requiring the transportation of pupils or students from one school to another, or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." 42 USCA 2000 c-6.

The Elementary and Secondary Education Act of 1965, as amended, declares that "In the administration of this chapter no department, agency, officer or employee of the United States, shall exercise any direction, supervision or control over the personnel, curriculum or program of instruction of any school or school system, or any local or state educational agency or require the assignment or transportation of students or teachers in order to overcome racial imbalance." 20 USCA 242.

The 1968 Appropriations Act, applicable to the period in question here, is even more specific:

> §409. "No part of the funds contained in this act may be used to force bussing of students, abolishment of any school, or to force any student attending any elementary or secondary school to attend a particular school against the choice of his or her parents or parent in order to overcome racial imbalance."
>
> §410. "No part of the funds contained in this act shall be used to force bussing of students, the abolishment of any school, or the attendance of students at a particular school in order to overcome racial imbalance as a condition precedent to obtaining federal funds otherwise

available to any state, school district or school; * * * * * * * Provided further, That notwithstanding any other provision of law, funds or commodities for school lunch programs or medical services may not be recommended for withholding by any official employed under appropriations contained herein in order to overcome racial imbalance." PL 90-557, Title IV, 1 US Code Cong. Adm. News, p. 1145-46 (1968).

Sections 401 and 407a specifically apply only to Title 4 actions brought by the Attorney General, but the other sections quoted above apply to all federal officials, and in any event, the Title 4 sections constitute a definitive declaration of congressional intent under the enforcement clause (§5) of the Fourteenth Amendment. See South Carolina v. Katzenbach, 383 U.S. 301 (1966); United States v. Gainey, 380 U.S. 63 (1965); Ferguson v. Skrupa, 372 U.S. 726 (1963); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Griswold v. Connecticut, 381 U.S. 479 (1965); United States v. County Board of Electors, 248 F. Supp. 316, 322 (D.C. N.Y. 1965), app. dism. 383 U.S. 575 (1966).

In the present case, the desegregation plan under attack was adopted by the Clarke County Board of Education pursuant to compulsion of HEW in pending Title 6 enforcement proceedings (A. 97, 164, 223). Consequently, contrary to the Petitioners' contentions, this is not a case where the action of the Clarke County Board of Education is to be appraised as if the Board had voluntarily adopted the plan in question as a matter of

independently-formulated policy. Peterson v. Greenville, 373 U.S. 244 248 (1963); Lombard v. Louisiana, 373 U.S. 267, 273 (1963); Griffin v. Maryland, 37 3 U.S. 130, 135 (1964), and see Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 725 (1961); Shelley v. Kramer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948). For these reasons, the desegregation plan in dispute is subject to the proscriptions of the federal statutes quoted above, and its legality must be tested thereby, for "the (government) is responsible for the discriminatory act of a private party when the (government) by its law, has compelled the act." Adickes v. Kress & Company, 398 U.S. 144, 26 L.Ed.2d at 161 (1970). If this analogy to "state action" concepts under the Fourteenth Amendment is not applicable in determining the applicability of the anti-bussing provisions to desegregation plans adopted by state school boards under federal compulsion, it is difficult to perceive how the statutes could ever be invoked.

Therefore, the evidence being undisputed that the plan in question was adopted solely for the purpose of achieving racial balance (A. 42, 82, 97, 113), the Supreme Court of Georgia correctly held that the Civil Rights Acts were violated by the plan (A. 232).

Respondents do not overlook several decisions which hold that these anti-bussing statutes do not apply to the southern states, but only to the so-called de facto segregated situations in the North.

United States v. Board of Education of Jefferson County, 372 F2d 836, 874-888 (C.A. 5th 1967), adhered to on rehearing en banc, 380 F2d 385 (1967), cert. den. sub nom. Caddo Parish School Board v. United States, 389 U.S. 840 (1967); Keyes v. School District No. 1 of Denver, Colo., 303 F. Supp. 289 (D.C. Colo. 1969); U. S. v. School District 151 of Cook County, 301 F. Supp. 201 (D.C. Ill. 1969); Harvest v. Board of Instruction of Manatee County, 312 F. Supp. 269 (D.C. Fla. 1970); Moore v. Tangipahoa Parish School Board, 304 F. Supp. 244 (D.C. La. 1969); Spangler v. Pasadena Board of Education, 311 F. Supp. 501 (D.C. Calif. 1970); United States v. Board of Trustees of Crosby Independent School District, 424 F2d 625 (C.A. 5th 1970), and compare, Swann v. Charlotte-Mecklenberg Board of Education, 312 F. Supp. 503 (D.C. N.C. 1970), involving the North Carolina anti-bussing statute, §115-176.1.

Respondents do not believe that the day has come in these United States when this Court will hold that the Constitution and laws mean one thing in Georgia and something else in Illinois or Indiana.

As stated by Judge West in Davis v. East Baton Rouge Parish School Board, 269 F. Supp. 60 (D.C. La. 1967);

> "There can, of course, be no such thing as true constitutional government in the United States if the Court is legally permitted, as that Court (the Fifth Circuit) has done, to declare that the constitution means one thing in seventeen states and something else in the remaining thirty-three states."

And, as held by Judge Hoffman in Beckett v. School Board of Norfolk, 308 F. Supp. 1274, 1304-5 (D.C. Va. 1969):

> "Assuming arguendo that de jure segregation is the result of either discriminatory public laws or actions by public officials, we have great difficulty in determining how any segregation can actually be de facto. Research discloses that practically every state, outside the so-called "Deep South," at some point in history had either (1) mandatory segregation of public schools, (2) permissive segregation, (3) anti-Negro voting laws, (4) miscegenation statutes, or (5) local practices, as revealed by judicial decisions or articles, regardless of state laws. Whether such state action required or merely permitted school segregation should be irrelevant if the result was segregation of the races. Even where such statutes were repealed prior to 1954, the pattern of segregation may have been so well established that its continued existence could only be de jure."
>
> * * * * *
>
> "We cannot believe that the Constitution may be interpreted one way for a group of states, and still another way for the remaining states."

In Monroe v. Board of Commissioners of Jackson, 380 F2d 955, 958 (C.A. 6th 1967), rev'd. on other grounds, 391 U.S. 450 (1958), the Court declared:

> "However ugly and evil the biracial school systems appear in contemporary thinking, they were, as Jefferson supra, concludes, de jure and were once found lawful in Plessy v. Ferguson. . . and such was

the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial bill of attainder."

As pointed out in Part I (d), supra, it is not realistic to assume that racial imbalance is anymore injurious in Georgia than it is in any so-called de facto state. The minority pupil hardly can be expected to appreciate this nice distinction. And, as we also observed, as did Judge Hoffman in the Norfolk case, acts of de jure segregation can be found in all states, particularly under the rationale of Gaston County v. United States, 395 U.S. 285 (1969), holding that 61 year old acts of discrimination would continue to have effect today.

More to the point, however, the legislative history of the 1964 Act demonstrates that no such distinction was intended.

In a colloquy between Senators Saltonstall and Smathers, the former referred to the fact that as worded, the Act would not upset a Massachusetts court decision holding that assignments to overcome imbalance were not required, after which the following transpired:

"MR. SMATHERS. Would the Senator be willing to grant the same right to the people in the South that has been granted to the people in Massachusetts?

"MR. SALTONSTALL. As I understand, this provision would certainly apply to all parts of the country. That

is the reason I agreed to the language in the substitute bill."

Also, on that page, Senator Saltonstall said:

> "As I see it, it refers to the local administration, wherever that local administration may be. It is not an effort to do something for the North as against the South. I am certainly opposed to anything in the bill that is of a regional character.
>
> "The substitute bill provides that the local authorities, within their responsibilities, shall operate the school system, and are not required to achieve a racial balance or correct a racial imbalance through moving children by bus into a community where they ordinarily would not go to school." (Congressional Record, U. S. Senate 1964, p. 13821 (June 4).

Also, in the Senate, Senator Humphrey referred to the fact that the provision was based upon the decision in Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (D.C. Ind. 1963), aff'd. 324 F2d 209 (C.A. 7th 1963), cert. den. 377 U.S. 924 (1964), and while the Court of Appeals for the Fifth Circuit erroneously concluded from this reference that the act was directed only at de facto states, United States v. Jefferson County Board of Education, supra, 372 F2d at 862, it is clear that Indiana was a de jure state, for as noted by the Court:

> "Prior to 1949, Gary had segregated schools in what is commonly known as the Pulaski Complex. Two schools were built on the same

> campus, one was called Pulaski-East and the other Pulaski-West. One was occupied by Negro students and the other by white students. This was in accordance with the separate but equal policy, then permitted by Indiana law, (Burns Indiana Statutes Annotated, 1948 Replacement, Section 28-5104). In 1949, Indiana repealed the separate but equal law and passed a new act expressly prohibiting segregated schools on the basis of race, color or creed, (Burns Indiana Statutes Annotated, 1948 Replacement, Pocket Supplement, 28-5158)." (213 F. Supp. at 822).

Similarly, in Deal v. Cincinnati Board of Education, 419 F2d 1387, 1391 (C.A. 6th 1969), after reiterating its prior holding that the Constitution does not require the bussing of pupils to relieve against imbalance, the Court referred to findings of the trial court to the effect that the state (Ohio) had maintained segregated schools for Negroes on a voluntary basis until 1955 - one year after Brown. This clearly is no different than any southern state whose laws required segregation, for this Ohio arrangement is tantamount to the "three school" plans struck down by the courts. Boson v. Rippy, 285 F2d 43, 46 (C.A. 5th 1960); Houston School District v. Ross, 282 F2d 95 (C.A. 5th 1970); Kelley v. Nashville, 159 F. Supp. 272 (D.C. Tenn. 1958), aff'd. 270 F2d 209 (C.A. 6th 1959), cert. den. 361 U.S. 924 (1959). This is certainly such a significant involvement by the state in the promotion of segregation as to supply the element of state action. Reitman v. Mulkey, 387 U.S. 369 (1967); Anderson v. Martin, 375 U.S. 399 (1964).

If the anti-bussing statutes are valid, they should be enforced equally throughout the United States or not at all, and not selectively applied under disingenuous de facto- de jure distinctions.

(3) Aside From Other Considerations, The Plan Imposes Unequal Burdens Upon The Negro Respondents.

Petitioners' plan is based upon geographic zoning under which pupils attend the schools located in their respective zones near to their homes. However, in order to obtain the necessary quantity of Negro children from the inner city to desegregate the outlying schools, the officials arbitrarily selected five "pockets" of Negro pupils to be bussed out of their attendance areas to schools located in the suburban areas (A. 83, 114). All of the Negro children in the pockets are bussed except those in the West Broad district, who are required to walk to the Barrow School located outside their zone (A. 48, 116, 136, 154). Petitioners admit that in this respect, the Negro children are treated differently (A. 102).

This obviously places a burden of desegregation upon these Negro children which is not imposed against any white and some Negro, children. It therefore is unconstitutional. See Felder v. Harnett County Board of Education, 409 F2d 1070, 1074 (C.A. 4th 1969), disapproving a plan which placed unequal burdens upon the Negro students by closing

only the schools located in Negro neighborhoods. However, see to the contrary, Norwalk CORE v. Norwalk Board of Education, 298 F. Supp. 203 (D.C. Conn. 1968), upholding such a plan on the reasoning that while people are created equal, neighborhoods are not. However, "To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race." United States v. Jefferson County Board of Education, supra (372 F2d at 876).

Here, the plan imposes a burden upon the Negro respondents which is not imposed on others, and the basis is their race. This is a "discrimination based on race." The fact that it is rescrted to in order to bring about racial balance to satisfy HEW does not render it valid any more than the white respondents can be subjected to the burden of being assigned to schools because of their race. The seventeen states whose segregation laws were struck down in Brown obviously considered that the racial classification and assignment made thereby were to better the public good, but this court rejected the contention. The Court should not now resurrect racial discrimination under the guise of promoting a judicially-approved end whose merits are equally debatable.

(4) The Desegregation Plan Adopted By The Board And Rejected By HEW Was Valid; Therefore, The Court's Decision Setting Aside the HEW - Compelled Plan Is Correct And Should Be Affirmed.

The desegregation plan set aside by the Supreme Court of Georgia below was adopted by petitioners in response to requirements of HEW in pending compliance proceedings under Title 6 of the Civil Rights Act of 1964. Previously, the Board had adopted a more conventional neighborhood zoning plan in April, 1969 (A. 163) but this was rejected by HEW as being inadequate on June 30 (A. 164, 223). Thereafter, and because of the HEW rejection, the plan now in dispute was adopted on July 30 (A. 203).

The details of the April plan disapproved by HEW are set forth in the record (A. 167).

It is the position of respondents that (1) The April plan was valid (2) HEW erred in rejecting it and requiring petitioners to adopt the plan in dispute, and (3) That consequently, the decision of the Supreme Court of Georgia, constituting in effect, judicial review of administrative action of petitioners and HEW, was correct as a matter of law in the result it reached regardless of its reasoning.

Referring to the rejected plan (A. 167), it is seen that no all-Negro nor all-white schools would have existed thereunder. In only 2 of the 13 elementary schools would the Negro exceed the white enrollment (West Broad and East Athens). This plan would place 100% of the elementary pupils in the system in desegregated schools. Only one majority-black school (East Athens) has more than 65% Negro students. Only 42% of the Negro elementary pupils would be in majority-Negro schools, which is less than all but one of the major Northern cities referred to in the brief of the State of Georgia (p. 9), and the latter are system-wide percentages, compared against Clarke County's elementary percentages (Elementary percentages generally show greater racial isolation because of the more pronounced effect of a neighborhood plan on residential patterns).

Aside from whether the Constitution requires assignment of pupils by race to overcome racial imbalance, respondents submit that it most certainly does not require a quota system. Wright v. Rockefeller, 211 F. Supp. 460, 468 (D.C. N.Y. 1963), aff'd. 376 U.S. 52 (1964); Progress Development Corp. v. Mitchell, 182 F. Supp. 681 (D.C. Ill. 1960), rev'd. in part, 286 F2d 227 (C.A. 7th 1961); Banks v. Housing Authority, 120 Cal. App. 2d 1, 260 P2d 668 (1953), cert. den. 347 U.S. 974 (1954); Taylor v. Leonard, 30 N.J. Super. 116, 103 A2d 632 (1954);

United States v. Jefferson County Board of Education, supra, 372 F2d at 847, f.n. 5; Stell v. Savannah-Chatham County Board of Education, 333 F2d 55, 59 (C.A. 5th 1964), cert. den. 379 U.S. 933 (1964); Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134, 139 (D.C. N.Y. 1968); Truax v. Raich, 239 U.S. 33, 42-3 (1915); Deal v. Cincinnati Board of Education, supra, 419 F2d at 1390-1; Kemp v. Beasley, 423 F2d 851, 857 (C.A. 8th 1970). "We are not yet prepared for the sacrifice of other values at the altar of uniform percentages." Kemp v. Beasley, supra (Judge Blackmun).

Consequently, since the decision of the Supreme Court of Georgia, in effect, reversing the action of HEW was correct, it is immaterial whether all that was said in the opinion may square with this Court's views or not, for "[I]t has been the uniform doctrine of this Court that, where it appears that the judgment of the state court must be affirmed on other grounds disclosed in the record, it will not be reversed for an erroneous ruling of the state court on a federal question not necessary to the decision of the cause." Crescent City Livestock Company v. Butchers' Union Company, 120 U.S. 141, 156 (1887).

CONCLUSION

The great tragedy of Brown is not the decision itself - de jure racial discrimination was destined to extinction sooner or later anyway -

but the unrealistic expectations of those who rejoiced at its demise. It was erroneously assumed that the invalidation of artificial barriers of the law would immediately usher in a new era of idyllic peace, prosperity and tolerance in which all the problems of poverty, deprivation and misunderstanding would quickly evaporate. Now that those expectations have not received fulfillment, the fallacious idea is urged that what the country needs is not merely governmental neutrality but compulsory association. Many well-meaning people apparently believe that this is the only solution for all the ills that beset our beleaguered republic. But the assumption has proven false. Mr. Joseph Alsop had occasion to observe earlier this year that "The attempt to integrate this country's schools is a tragic failure", Newsweek, February 23, 1970, p. 108, and this same idea permeates the Chief Justice's dissent in the Washington, D. C. school case while he was a member of the Court of Appeals. Smuck v. Hobson, 408 F2d at 196.

Whether desegregation thus far has been a failure or not, we can not express too strongly our feelings that compulsory integration will not only fail, but destroy public education and irretrievably divide the country as well.

Compelling people to associate against their will does not lessen, but only exacerbates, racial tensions. There were no riots,